**PP**

**v.**

**KIT CHEE WAN**

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CRIMINAL APPEAL NO: 41-31-1997]
15 OCTOBER 1998

***EVIDENCE:*** *Expert evidence - Gaming - Whether only Minister of Finance may gazette common gaming expert - Whether evidence of expert wrongly gazetted could be accepted - Lotteries Act 1952, ss. 3, 4 & 14 - Common Gaming Houses Act 1953, ss. 2 & 11*

***CRIMINAL LAW:*** *Common Gaming Houses Act 1953 - Section 4A(a) - Assisting in carrying out public lottery - Expert witness wrongly gazetted - Whether evidence of such expert flawed - Whether evidence may still be accepted - Whether exhibits proved to be gaming documents beyond reasonable doubt - Whether presumption in s. 11(1) arises*

The respondent was charged under s. 4A (a) of the Common Gaming Houses Act 1953 ('the CGHA') for assisting in carrying out a public lottery. As part of its case, the prosecution had called a common gaming expert ('SP4') to give evidence. It was in evidence that SP4 was gazetted pursuant to the CGHA by the Deputy Home Minister. However, the magistrate did not accept SP4's expert evidence due to some flaw in his appointment and thus the respondent was acquitted. Subsequently, the prosecution filed this appeal contending that it was not wrong for the Deputy Home Minister to gazette SP4 as an expert.

**Held:**

**[1]** The Lotteries Act 1952 provides that it is the Minister of Finance who grants the permit for the promotion or conduct of any lottery and that it is he who is responsible for the promulgation of the regulations. Therefore, pursuant to s. 11 of the CGHA read together with s. 2 of the CGHA, the relevant minister to gazette a common gaming expert must be the Minister of Finance and nobody else.

**[2]** Although expertise is not obtained through administratively correct gazetting, in the context of the CGHA, the requirements must be stringently adhered to. By the very nature of the offence, and the provisions which have provided presumptions to assist the prosecution, it is therefore necessary that the provisions of the CGHA be strictly complied

with. Even though SP4 had testified that he was an expert, that he had adduced evidence before as an expert, that his evidence had been accepted in courts before and, in the current case, he had described the gaming characteristics of the various exhibits, that still did not meet the statutory requirement.

**[3]** An error in the gazetting of an expert, therefore, neutralises the expert's evidence in relation to his expertise. As the gazetting was invalid, and with no other evidence available for consideration, the court was not convinced that SP4 had been properly appointed. Thus, SP4's views regarding the documents could only be equated with a mere opinion held by any layman.

**[4]** Without the expert and admissible evidence of SP4 regarding the gaming related documents, the prosecution have merely tendered pieces of papers having unintelligible words scribbled on them. Therefore, it could not be said that the prosecution had proved beyond reasonable doubt that the exhibits were gaming documents. Without successfully proving that they were related to public lottery, the presumption under s. 11(1) of the CGHA could not be alluded to and utilised by the prosecution.

**[5]** Whether it is a summons or an arrest case, an accused is entitled to the full weight of the law of evidence and no diminution of that standard should be entertained by a court of law. If there be any doubts present in the prosecution's case, especially something so substantive as in this case where the very foundation of the prosecution's case could not do away with expert evidence, then the benefit of that doubt must be conferred on the accused.

***Obiter:***

**[1]** Be it a summons or an arrest case, any respondent is entitled to the full weight of the law of evidence, and no diminution of that standard should be entertained by a court of law.

**[2]** If there be any doubts present in the prosecution case, where the very foundation of the prosecution case could not do away with expert evidence, then the benefit of that doubt must be conferred on the respondent.

*[Appeal dismissed with costs.]*

**Case(s) referred to:**
*Chai Ah Gioh v. PP [1955] 21 MLJ 58* ***(cit)***
*Cheng Ah Sang v. PP [1948] 14 MLJ 82* ***(refd)***
*Lye Kooi Yoon & Goo Sim Ean v. Timbalan Pendakwa Raya (Mahkamah Tinggi Pulau Pinang, Rayuan Jenayah No: 41-102-1996)* ***(not foll)***
*Mat v. PP [1963] 29 MLJ 263* ***(cit)***
*Ong Yap Chang v. PP [1962] 28 MLJ 46* ***(cit)***
*Syed Abu Bakar Ahmad v. PP [1984] 1 CLJ 80* ***(refd)***
*Teoh Ng Choon & Ors v. PP [1955] 21 MLJ 58* ***(cit)***
*Wong Chop Saow v. PP [1965] 31 MLJ 247* ***(cit)***

**Legislation referred to:**
Common Gaming Houses Act 1953, ss. 2, 4A(a), 11(1), (3), (4), (5), (6)
Criminal Procedure Code, s. 399
Evidence Act 1950, ss. 56, 57
Lotteries Act 1952, ss. 3, 4, 14

*For the prosecution - Maziah Abu; Pejabat Penasihat Undang-undang*
*For the respondent - Peter Foo Nyong Tiam; M/s Foo Nyong Tiam & Assoc*

*Reported by S Dharmendran*

## JUDGMENT

**Suriyadi Halim Omar J:**

The respondent was charged under s. 4A(a) of the Common Gaming Houses Act 1953 (Act 289) for assisting in carrying out a public lottery. If found guilty he would be liable to a fine of not less than RM20,000 and not more than RM200,000 and shall also be imprisoned for not more than five years. It was indisputable that the respondent was facing a charge which entailed severe punishments. The prosecutor called five witnesses, including a common gaming expert ie, one Chief Inspector Tan Kok Hian (SP4). The evidence adduced by the prosecution attested to a scenario where the respondent when arrested personally took out certain items from his pockets, namely:

(i) P1 – a small book;

(ii) P2 – blue carbon paper;

(iii) P3 – a small book bearing nos. 555;

(iv) P4 – a purse;

(v) P5 – some money totalling RM331; and

(vi) P6 – 2 ball pens.

In spite of SP4's expert evidence, and in spite of the overwhelming evidence of the respondent being in possession of the above items, the latter was still acquitted. The prosecution filed an appeal and I heard it. At the end of the hearing I dismissed the appeal.

Evidence was adduced to confirm that SP4 was a gaming expert who had been gazetted as one, *vide* Warta Kerajaan PU(B) 625, on 26 November 1987. He testified that he had undergone three gaming courses and was familiar with giving of evidence in open court. The learned magistrate had no qualms about accepting parts of his evidence except on the issue of his expert evidence, due to some flaw in his appointment. Having scrutinised the evidence and the law, I was fully satisfied that the learned magistrate was right in arriving at that conclusion, and hence supporting the acquittal of the respondent. Shifting through the notes of proceeding it transpired that SP4 was gazetted pursuant to the Common Gaming Houses Act 1953 (Act 289), by Y.B. Dato' Megat Junid bin Megat Ayob, the Deputy Minister of Home Affairs. The production of P.U.(B) 625 confirmed that the gazetting was pursuant to s. 11 of the said Common Gaming Houses Act 1953.

Under s. 11(6) of the above Act, to qualify as an expert, a person will have to be gazetted by the Minister. Under s. 2 of this same Act, "Minister" means a Minister who is charged with the responsibility of the regulation of lotteries. The next step sees this discourse taking a sojourn into the realm of the Lotteries Act 1952 (Act 288). Section 14 of this Lotteries Act empowers the Minister of Finance to make the relevant regulations regarding lotteries; and prescribing any matter which may be necessary to enforce the purpose of the Lotteries Act 1952. Section 3 of the latter Act, in crystal clear terms also provide that any lottery promoted or conducted without a permit by the Minister of Finance shall be unlawful. For purposes of easy reference I reproduce ss. 3 and 4:

> 3. Subject to section 16, any lottery promoted or conducted without a permit granted by the Minister of Finance under this Act or otherwise than in accordance with this Act shall be unlawful.
>
> 4.(1) The Minister of Finance may, in his discretion, grant a permit to any person or society for the promotion of a lottery, whether public or private, for the purpose of raising funds to be applied in aid of any philanthropic, religious, educational or welfare organisation, institution, body or service, or in carrying out any philanthropic, religious, educational or welfare scheme or project, or any specific work beneficial to the community or any part thereof or for the improvement of the social condition or for the advancement of the welfare of the community or any part thereof in some specified way or ways or for any other purpose of a charitable nature:

Provided that no funds so raised shall be applied for any purpose connected with the religion of Islam:

Provided further that where a private lottery is to be promoted by a society whose objects are predominantly of a social or sporting character, the purpose for which the funds are to be raised may include the furtherance of the objects of such society.

(2) Such permit may be granted either in respect of a particular lottery or in respect of a series or number of lotteries to be promoted within such period of time as the Minister of Finance may specify in the permit.

(3) ...

(4) ...

(5) ...

The inescapable conclusion derived from the above provisions is that it is the Minister of Finance who grants the permit for the promotion or conduct of any lottery, and, pursuant to other provisions, is also responsible for the promulgation of the regulations. Therefore, reverting to s. 11(6) of the Common Gaming Houses Act 1953 (Act 289), read together with s. 2, the relevant Minister to gazette a common gaming expert must be the Minister of Finance and nobody else. Certainly not the Deputy Minister of Home Affairs.

Some diligence was portrayed by the learned Deputy Public Prosecutor, when she cited the unreported case of *Lye Kooi Yoon & Goo Sim Ean v. Timbalan Pendakwa Raya,* Mahkamah Tinggi Pulau Pinang, Rayuan Jenayah No: 41-102-1996 to support her appeal. In the latter case, the same issue was canvassed in open court, as the expert was similarly gazetted by the Deputy Minister of Home Affairs, and not by the Minister of Finance. His Lordship there advanced a highly significant question as to whether as improperly gazetted expert could statutorily be denied of that expert status. His Lordship opined:

Pada pandangan saya seorang itu menjadi pakar dalam sesuatu ilmu bukan kerana warta, tetapi kerana kelayakannya dan pengalamannya dalam sesuatu bidang itu. Kelayakan akademik sahaja pun tidak menjadikan seseorang itu seorang pakar. Sebaliknya ketiadaan kelayakan akademik juga tidak menghalang seseorang itu daripada menjadi seorang pakar dalam sesuatu bidang. Kepakarannya boleh diperolehi melalui pengalaman.

Mengenai saksi pakar loteri, saya tidak dapat menemui mana-mana peruntukan atau penghakiman yang mengatakan bahawa cuma seorang yang diwartakan di bawah seksyen 11(6) Akta Rumah Judi, Terbuka 1953 sahaja yang layak memberi keterangan itu.

Further down His Lordship commented that:

> Pada pandangan saya tidak kira sama ada seseorang itu diwartakan atau tidak dia dikehendaki memuaskan mahkamah tentang kepakarannya dan caranya disebut dalam petikan di atas ...
>
> Pada pandangan saya itu sudah memadai untuk beliau diterima sebagai seorang pakar judi. Perkara (subject matter) yang menjadi persoalan kepakaran ialah mengenai judi ekor, bukan mengenai jenis dadah berbahaya misalnya, yang memerlukan analisa makmal. Setiap penikam judi ekor pun kenal "tiket ekor".

Having considered the views of Abdul Hamid J, as much as I agree that expertise is not obtained through administratively correct gazetting, in the context of the Common Gaming Houses Act 1953, the requirements must be stringently adhered to. Laville, J in *Cheng Ah Sang v. Public Prosecutor* [1948] 14 MLJ 82 had occasion to say:

> I would call the attention of the police authorities to the fact that gaming is a highly technical and artificial offence and that to ensure a conviction it is necessary that the provisions of the Enactment be rigidly and meticulously followed out, in order that the presumptions laid down for the help of the police in prosecuting offenders may arise.

Eventhough s. 11 is silent as to the requirement that an expert must establish his status as an expert for prosecution purposes, apart from the built-in administrative requirement under s. 11(6), it is quite established that case laws do require an expert to prove his background and capability. Eventhough SP4 had orally testified that he was an expert, that he had adduced evidence before as one, that his evidence had been accepted in courts, and in the current case had described the various exhibits, particularly the gaming characteristics, that still did not meet the statutory requirement. By the very nature of the offence, and the provisions which have provided presumptions to assist the prosecution, it is therefore necessary that the provisions of the Common Gaming Houses Act 1953 be strictly complied with. This is to ensure that fair play and a balance treatment is accorded to an accused person, *vis-a-vis* the prosecution who is assisted by "presumption provisions".

Perusing s. 11 in particular 11(3), (4) and (5), the prosecution could attempt to prove its case by means of oral testimony of the expert or by a certificate supplied by him. In the event the prosecution adverts to certificates as evidence of proof of gaming certain pre-conditions must still be complied with. As it is my stance that an error in the gazetting of an expert for cases under the Common Gaming Houses Act 1953 neutralises his evidence in relation to his expertise, it is therefore pertinent that I discuss s. 11 in some depth. The course of action of tendering a certificate, affirmed by an expert, will permit the dispensation of the maker during the trial in the event he is not required to

attend the hearing. This mode is analogous to documents eg, medical certificate, chemist report, etc. being tendered during trials pursuant to s. 399 of the Criminal Procedure Code, without the makers being required to attend as witnesses. If one were to browse through s. 399 of the Criminal Procedure Code, and s. 11 of the Common Gaming Houses Act 1953, nowhere do they provide that the makers are required to prepare affidavits to confirm and establish their credentials. Indisputably, to establish their credentials and having to suffer the least form of hassle, the best way is by endorsing the certificates with their names and rank if any. Thereafter, if the experts have been gazetted, the prosecution may safely seek recourse in ss. 56 and 57 of the Evidence Act 1950 whereat courts shall take judicial notice of their expert standing. The snag will only arise if the gazetting of a person was not done by the correct Minister ie, the Minister of Finance in this case, and in which situation that flaw will render the contents inadmissible.

Section 11 of the Common Gaming Houses Act 1953, and all its subsections, surely must have a special role to play in the statute, in the country's continuous war to eradicate such highly technical offences abhorred by Parliament. It must be due to the desire of this institution to put into effect that intention that these provisions were promulgated, *inter alia*, necessitating the appointment of experts. The fact that SP4 was gazetted by the Deputy Minister of Home Affairs, albeit wrongly, must be a tacit admission of the necessity of having gaming experts to be gazetted. To wind up on this point, as the gazetting was invalid, and with no other evidence available for my consideration, I was therefore not convinced that SP4 had been properly appointed. Thus a serious chink existed in the prosecution's chain of evidence. No matter what the charge is against an accused person, it has always been the principle that it is the duty of the prosecution to prove the prisoner's guilt beyond reasonable doubt (*Mat v. Public Prosecutor* [1963] 29 MLJ 263).

The learned Deputy Public Prosecutor did attempt to persuade me that it was not wrong for the Deputy Minister of Home Affairs to gazette SP4 as an expert. She ventilated that the purposeful usage of "may", in s. 11(6) of the Common Gaming Houses Act 1953, gave that power to Y.B. Dato' Megat Junid bin Megat Ayob to do so. I found this argument to be unacceptable and devoid of logic, as the usage of the word "may" in the context of that provision, merely meant that an expert may be appointed, but that appointment must be done by the Minister of Finance and announced in the gazette. The two pre-conditions must be fulfilled. To acquiesce to her argument that a different Minister may take over the duties of the Minister of Finance, would tantamount to even permitting the Minister of Waterworks to gazette SP4 as a gaming expert. Surely that is not the sacred intention of Parliament.

Without the expert and admissible evidence of SP4, regarding the gaming related documents, the learned magistrate would be in a rather difficult position to decide either way. Abdul Hamid FJ (as he then was) in *Syed Abu Bakar bin Ahmad v. Public Prosecutor* [1984] 2 MLJ 19 at p. 23 had occasion to say:

> It is settled principle that while it is true that a judge who sits alone is entitled to weigh all the evidence, to put his own magnifying glass to determine the probabilities so as to speak and form his own opinion or judgment, it would be erroneous for him to form a conclusion on a matter which could only be properly concluded with the aid of expert evidence.

Apart from a magistrate having to adjudicate whether to accept or reject the evidence of the expert, he is also required to make a finding of fact based on the available evidence (*Wong Chop Saow v. Public Prosecutor* [1965] 31 MLJ 247). Be it a summons or an arrest case, any respondent (accused) is entitled to the full weight of the law of evidence, and no diminution of that standard should be entertained by a court of law. If there be any doubts present in the prosecution's case, especially something so substantive as in this case, where the very foundation of the prosecution's case could not do away with expert evidence, then the benefit of that doubt must be conferred on the respondent (accused).

Evidentially, without SP4's evidence, the prosecution would merely have tendered pieces of papers having unintelligible words scribbled on them, to be deciphered by a young and flabbergasted magistrate (*Ong Yap Chang v. Public Prosecutor* [1962] 28 MLJ 46). Bearing in mind the technicalities involved, and where expert evidence is not a mere formality, or where that presiding magistrate could not be said to know much more than the expert, he would definitely have found himself in a rather embarrassing position. As that relevant evidence pertaining SP4's expertise was flawed, his views regarding the documents therefore could only be equated with a mere opinion held by any layman. It is trite that the law of evidence imposes a different set of rules for such opinion *vis-a-vis* that of an expert. Without that assistance from the expert, the learned magistrate will be grappling alone in the dark to resolve undeciphered and mysterious looking documents (*Teoh Ng Choon & Ors v. Public Prosecutor;* and *Chai Ah Gioh v. Public Prosecutor* [1955] 21 MLJ 58). On that score, it could not be said that the prosecution had proved beyond reasonable doubt that the exhibits were gaming documents. Without successfully proving that they were related to public lottery, the presumption under s. 11(1) of the Common Gaming Houses Act 1953 could therefore not be alluded to and utilised by the prosecution. The contagion effect invariably was that the prosecution did fail to prove that the respondent assisted in carrying on a public lottery, hence the dismissal of the appeal.